Office-Supreme Court, U.S.
FILED
SEP 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 195

LAWRENCE D. SULLIVAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

GABRIEL T. PAP
Attorney for Petitioner
No. 51 East 67th Street
New York, N.Y. 10021
212—LE 5-4195

IN THE

Supreme Court of the United States

October Term, 1969

No. 195

LAWRENCE D. SULLIVAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

Reasons for this Reply Brief

This Reply Brief is addressed to the following arguments first raised in the brief in opposition:

1. The respondent reverts to the outset of the present litigation, contradicting itself, the Court of Appeals and established rules.

2. Contention, that the decision here is consistent with *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7).

3. Contention, that there is no conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9).

4. Some additional evidence was introduced on remand.

5. The concept of generosity.

6. Petitioner conceded, that the total transportation did not increase his driving expenses.

7. Respondent avers, that *Crowther* was overruled.

8. The numerical cost of driving the car is irrelevant.

Argument

1. The respondent squarely contradicts himself by stating that

> "Once it is determined that a taxpayer would drive to work regardless of the need for transporting tools, his driving is commuting and nothing else. There is simply no basis for deducting any expenses."

though he ruled

> "Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under section 162 of the Internal Revenue Code of 1954." Rev. Rul. 63-100 (Cum. Bull. 1963-1, page 34),

the full text of which is printed in the Appendix, *infra*, page 9.

The Tax Court of the United States in its original decision of the case at bar was

> "* * * of the opinion that all such trips by an employee between his home and place of employment are personal commuter trips, whether he carries no tools, one small tool, or a car full of the tools of his trade." Pet. 19a.

This opinion of the Tax Court was found by the Court of Appeals to be error, to be in conflict with § 162 of the Code of Internal Revenue and with Rev. Rul. 63-100. 368 F.2d 1007 (CA 2, 1966) appendix to the petition 9a).

Even

> "The Commissioner concedes on this appeal that so sweeping a disallowance was error." Pet. 11a first sentence of the second paragraph.

Respondent now reverts to the beginning of the present litigation, thereby establishing an insecurity in law, a legal chaos, to the effect, that no taxpayer in the United States can know, nor even guess, when preparing his tax return what is right or wrong: *Crowther,* or Rev. Rul. 63-100—which is long since overruled—or *Sullivan,* 45 T.C. 217, or the Court of Appeals 368 F. 2d 1007. Thus, the respondent by his brief fortified the need, if not really craved, for the decision of the issue by supreme judicial authority. He also collided with *Flowers,* 326 U.S. 465.

2. Respondent contends that

> "The decision here is consistent with the other appellate decision on point, Tyne v. Commissioner, 385 F. 2d 40 (C.A. 7)."

He would have hardly said so, if he would be aware, that *Tyne* filed a petition for a Writ of Certiorari in the Supreme Court No. 281. Moreover, one of the main reasons for Tyne's petition is its contradiction to Sullivan's instant case.

Among others, the *Government* in *Tyne* expressly "submitted that the allocation rule should not be followed" (Pet. 36a), whereas in the case at bar the brief in opposition clings to it. There is no "allocation rule" only a hollow mandate to the Tax Court to create one, which however was not created.

So respondent's reliance in the consistency of these two cases is nonexistent.

3. Respondent further alleges, that

> "There is not a conflict with *Crowther*" because that "decision turned on whether taxpayer was entitled to deduct 'traveling expenses * * * while away from home',"

whereas petitioner in the case at bar

> "did not incur the claimed transportation expenses 'while away from home'."

Transportation *not* away from home, in the pursuit of business, however, is deductible:

> "*Transportation expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee." § 62(2)(C) of the Internal Revenue Code of 1954.

Therefore nothing is accomplished by pinpointing that *Crowther* was away from home, whereas petitioner was not. The quoted § 62(2)(C) does away with any difference between travel, if in the pursuit of business away from or not away from home, except meals and lodgings.

The reference to *United States* v. *Correll,* 389 U.S. 299, 303, possibly refers to the remark

> "Any rule in this area must make some rather arbitrary distinctions,"

which is inapplicable in the case at bar. Not only because *Correll* deals with meals and lodgings, but because the issue in the case at bar is the legality of allocation between transportation of the petitioner and of his tools, irrespective of the arbitrariness or unarbitrariness of that allocation.

4. It is not clear what ends would be served by stating that

> "Some additional evidence was introduced,"

on remand. For the reason of completeness it is observed, that the only "evidence" was the testimony of a secretary of petitioner's employer whose testimony was discredited by the Tax Court for being hearsay.

5. The brief in opposition contends that ⅓ of the driving cost "is generous in the extreme." There is no rule in the Statutes, or a principle in the decisions of the courts which would allow or depend on or have regard to generosity. If there would be one: the petitioner at bar would not request and would not accept any generosity, he only claims what is due to him, and nothing else.

6. It would amount to sheer nonsense to state that an additional 32 pounds (as in *Sullivan*) increases the operating cost of a car. What is obvious, cannot be conceded. Concession means to agree to something, which is or can be controverted.

7. The decision of the Ninth Circuit in *Crowther* v. *Commissioner*, 269 F. 2d 292 stands for itself. Respondent alludes to that dictum in *Mathews* v. *Commissioner*, 310 F. 2d 98:

> "We do not think that our decision in Crowther depended upon the fact that the taxpayer in that case was required to carry his tools into the woods with him."

This cannot be taken as invalidating of the holding in *Crowther* recited on page 7 of the petition, in the case at bar, *i.e.*, that "the necessity of transporting his tools * * * was a business necessity rather than a personal necessity" and that this characterized "the operating expenses of the automobile and jeep" to be "ordinary and necessary expenses paid or incurred * * * in carrying on the trade or business of the taxpayer."

If the Mathews case would overrule *Crowther*, this would amount to discarding the commutation rule; transportation to the work site without tools is not discernible from commutation. Consequently we feel, that *Crowther* stands, and it is based on the necessity of carrying tools to the work sites.

In this connection the respondent calls the attention to that

"There is not a conflict with *Crowther*."

Crowther went from his home to his work site; same as *Sullivan*. *Crowther* went 30 to 40 miles each way outside the tiny spot Fort Bragg; *Sullivan* went 5.25 to 6 miles each way inside the metropolis of New York. Does quantity of distance result in a qualitative difference? Because if not, then the fact that the distances are in the country or within the metropolis cannot cause legal differences.

8. The case at bar prays for enunciation of a principle and not to contest an insignificant amount of tax already paid. Nothing is achieved by depicting an abrupt decrease of the total transportation expense from $1,494.72 to $409.70. But for the sake of completeness may it be stated, that petitioner claimed in his main brief to the Tax Court—that is the original proceeding and not on remand—pages 13 to 15, that his driving expenses were in the amount of $409.70, and not $1,494.72. This latter figure was an error by respondent.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

GABRIEL T. PAP
Attorney for Petitioner
No. 51 East 67th Street
New York, N.Y. 10021
212—LE 5-4195

September 1969

(APPENDIX)

Rev. Rul. 63-100 (CB 1963-1, 34)

"Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under section 162 of the Internal Revenue Code of 1954.

Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the necessity for transporting bulky musical instruments even if such expenses would otherwise be nondeductible commuting expenses.

Whether transportation expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him."